

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAY 21 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

| | | |
|-------------------------|---|----------------------------|
| THE STATE OF ARIZONA, |) | 2 CA-CR 2012-0106-PR |
| |) | DEPARTMENT A |
| Respondent, |) | |
| |) | <u>MEMORANDUM DECISION</u> |
| v. |) | Not for Publication |
| |) | Rule 111, Rules of |
| ALBERT DAVID SERPA JR., |) | the Supreme Court |
| |) | |
| Petitioner. |) | |
| _____ |) | |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2005011852003DT

Honorable Timothy J. Ryan, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Linda Van Brakel

Phoenix
Attorneys for Respondent

Albert David Serpa Jr.

Winslow
In Propria Persona

H O W A R D, Chief Judge.

¶1 Petitioner Albert Serpa Jr. seeks review of the trial court's order summarily dismissing his of-right petition for post-conviction relief filed pursuant to Rule 32, Ariz.

R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 In 2010, Serpa pled guilty to first-degree murder, aggravated assault, endangerment, and weapons misconduct. The trial court sentenced him to consecutive, aggravated prison terms for the latter three offenses, totaling twenty-five years' imprisonment, and to a consecutive life sentence for first-degree murder with the possibility of parole after twenty-five years. Serpa filed a notice of post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record and determined "that no good faith basis in fact and/or law for post-conviction relief exists."

¶3 Serpa then filed a pro per petition for post-conviction relief arguing his trial counsel had been ineffective in failing to disclose a conflict of interest, having allegedly "represented the victim[']s mother," and had "push[ed him] towards a plea because of [that conflict]." He also claimed his "legal team" had given him inaccurate advice, specifically that he would receive the death penalty if he went to trial and that he "had no chance in getting a lower sentence" at trial. The trial court summarily dismissed his petition, finding "no ineffective assistance of counsel," "no conflict of interest" or "any evidence supporting" that claim, and "no basis for alleging the pleas of guilty were made involuntarily."

¶4 On review, as we understand his arguments, Serpa essentially reurges his claims that his counsel had a conflict of interest and had given him incorrect or incomplete legal advice, ultimately giving him no "real choice" in accepting the plea. He asks that this court reverse his convictions or "at minimum grant a hearing to determine if

a conflict of interest exist[s].” “To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant.” *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006).

¶5 Serpa’s claim is, at its core, a claim that his decision to plead guilty was involuntary because his counsel either persuaded him to accept the plea because of a conflict of interest or rendered incorrect legal advice that caused him to accept the plea. A defendant may obtain post-conviction relief on the basis that counsel’s ineffective assistance led the defendant to make an uninformed decision to accept or reject a plea bargain, thereby making his or her decision involuntary. *See State v. Ysea*, 191 Ariz. 372, ¶¶ 15, 17, 956 P.2d 499, 504 (1998); *State v. Donald*, 198 Ariz. 406, ¶¶ 9, 14, 10 P.3d 1193, 1198, 1200 (App. 2000). To the extent Serpa’s claim rests on counsel’s alleged conflict of interest, Serpa “must show first that there was an actual conflict, and second that the conflict had an adverse effect” on counsel’s performance in his case. *State v. Jenkins*, 148 Ariz. 463, 466, 715 P.2d 716, 719 (1986).

¶6 Serpa has identified no basis for us to conclude the trial court erred in summarily dismissing his petition for post-conviction relief. In that petition, Serpa provided no evidence and cited no legal authority supporting his claims that his trial counsel had a conflict of interest or that his counsel had given him faulty or inaccurate legal advice concerning his chances at trial should he reject the plea offer. *See Ariz. R. Crim. P. 32.5* (petition for post-conviction relief must include “[l]egal and record citations” and all available “[a]ffidavits, records, or other evidence . . . supporting the

allegations of the petition” must be attached). Unsworn statements do not take the place of the affidavit or other sworn statement required to establish a colorable post-conviction claim warranting an evidentiary hearing. *See State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985) (unsubstantiated claim witness would give favorable testimony does not compel evidentiary hearing); *Donald*, 198 Ariz. 406, ¶ 17, 10 P.3d at 1200 (to obtain post-conviction evidentiary hearing, defendant should support allegations with sworn statements).

¶7 Additionally, Serpa did not assert that he would have rejected the plea had he believed there was a possibility that his sentence would have been something other than the death penalty upon conviction or that he accepted the plea offer only because his trial counsel had—as a result of his conflict of interest—pressured him to do so. *See Ysea*, 191 Ariz. 372, ¶ 17, 956 P.2d at 504 (“To establish prejudice in the context of a plea agreement, a defendant must show a reasonable probability that except for his lawyer’s error he would not have waived his right to trial and entered a plea.”); *see also Jenkins*, 148 Ariz. at 467, 715 P.2d at 720 (counsel’s conflict must cause “substantial[] negative impact” on defendant’s case). Thus, even assuming counsel’s conduct fell below prevailing professional norms and an actual conflict existed, Serpa has not established a colorable claim of prejudice or that there was an adverse effect caused by counsel’s purported conflict of interest.

¶8 And, in any event, Serpa’s petition for review contains no citations to the record or to legal authority; this failure alone would justify our summary refusal to consider his claims. *See Ariz. R. Crim. P. 32.9(c)(1)* (petition for review must comply

with rule governing form of appellate briefs and contain “reasons why the petition should be granted” and either appendix or “specific references to the record”), (f) (appellate review under Rule 32.9 discretionary); *see also* Ariz. R. Crim. P. 31.13(c)(1)(vi) (briefs must contain argument and supporting authority); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument waives claim on review); *State v. French*, 198 Ariz. 119, ¶ 9, 7 P.3d 128, 131 (App. 2000) (summarily rejecting claims not complying with rules governing form and content of petitions for review), *disapproved on other grounds by Stewart v. Smith*, 202 Ariz. 446, ¶ 10, 46 P.3d 1067, 1071 (2002).

¶9 For the reasons stated, although we grant review, relief is denied.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge